UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MONIQUE Da SILVA MOORE, et al.,

Plaintiffs,

v. 11 CV 1279 (RJS)

PUBLICIS GROUPE, et al.,

Defendants.

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New York, N.Y.
January 4, 2011
10:58 a.m.

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER LLP
Attorneys for Plaintiffs
JANETTE WIPPER
DEEPIKA BAINS

JACKSON LEWIS LLP
Attorneys for Defendant MSL Group
BRETT M. ANDERS
VICTORIA WOODIN CHAVEY

ALSO PRESENT:

PAUL J. NEALE, DOAR Litigation Consulting
GENE KILMOV, DOAR Litigation Consulting
ERIC SEGGEBRUCH, Recommind
CRAIG CARPENTER, Recommind

(In open court)

THE COURT: Having read, to at least a certain extent, all the things you were kind enough to fax me, including the 51-page fax that came in overnight twice -- so somebody owes us a ream of paper, which I won't collect, but let's try not to fax in that much -- here are my thoughts, to start:

We either need to revisit the issue of bifurcation of class action discovery and full merits discovery and/or, even treating it as such, it is clear to me that there is a difference between the discovery that would go on in a class action and the discovery treating every possible class plaintiff as an actual plaintiff, which defeats the whole purpose of having a class.

In addition, I don't think we have scheduled the motion for class certification, which should be handled sooner rather than later. So maybe we should start with that question: When will plaintiffs be ready to move for class certification? And I read the transcripts before Judge Sullivan dealing with bifurcation where both of you in essence promised Judge Sullivan that, no, no, no, that's not going to lead to all sorts of fights. And, frankly, I've seen nothing but fights since this case has been referred to me and, frankly, no progress.

So that's the first question: When are you planning to move for class certification? Who am I going to hear from

on the plaintiffs' side? Ms. Wipper?

MS. WIPPER: Yes, for the plaintiffs in the class.

Your Honor, the current schedule entered by Judge Sullivan has a close for fact discovery, I believe, of June 30th.

THE COURT: But it's too late to do class certification after the close of discovery. That's not what Rule 23 anticipates.

MS. WIPPER: Understood. We requested a bifurcated schedule, your Honor, to Judge Sullivan. We wanted class discovery first so we could address and target discovery for the class issues and also minimize potentially some of the disputes going on. However, defendant MSL opposed that.

THE COURT: I read all of that.

MS. WIPPER: OK.

THE COURT: And at the time, everyone thought it would be a smooth road and would be faster. It's not smooth and it's probably not faster. So maybe I'll do it this way: Do you both at this point, seeing where you've gotten yourselves -- and this I guess is somewhat of a question to both of you, so it will be a single yes-or-no question -- do you want to bifurcate?

MS. WIPPER: Plaintiffs would be willing to bifurcate if we did not change the current schedule, because we've lost so much time with the current schedule with all of these

discovery disputes. At this point we haven't taken one deposition of defendant witnesses. We've gotten a couple of thousands of documents, a lot of them are policy documents that are repetitive. We haven't gotten a lot of the information we have requested.

THE COURT: Is bifurcation -- and by bifurcation, I mean the only discovery that will go on -- is that aimed at deciding whether this should be a class action? Is that going to eliminate most of these fights, from plaintiffs' point of view, or if we agree to bifurcation, are you then going to say, but, Judge, we still want everything or 90 percent of everything set forth in our current letters about what the disputes are?

MS. WIPPER: Well, if I could just respond about some of the disputes, as an example --

THE COURT: No, no, no. In your view -- let me do it this way: OK, so you're potentially willing to bifurcate, let me leave it at that.

For the Jackson Lewis folks, who am I going to hear from?

MS. CHAVEY: Victoria Chavey.

THE COURT: Having opposed bifurcation the first time, what's your view on it now?

MS. CHAVEY: Your Honor, we would have two concerns with bifurcation at this point. One is, we would like to

proceed with discovery on the merits of the individual named plaintiffs' claims. So if there were a bifurcated discovery order at this point, we would still like to pursue merits discovery as to the individual claims.

THE COURT: But that means they're going to want merits discovery as to the individual claims against you, which is probably going to put us back in the quicksand that I'm trying to get you all out of.

MS. CHAVEY: The second concern, your Honor, that we have is related to that, and, that is, that we understand plaintiffs' position to be that to prove their pattern-or-practice claim, they do need to take discovery, in their view, on every single decision made at MSL over the last ten-plus years. So if their view of the pattern-and-practice claim is such that they need discovery on every single decision made, as opposed to focusing instead on what should be the common questions, then I don't know that bifurcating the discovery at this point is going to accomplish the goal that we all had back in the summer, which was efficiency.

I'd also like to say, your Honor, just at the outset, I conferred with counsel for the parent company, Publicis Groupe yesterday with regard to whether they needed to appear. It didn't appear to be necessary, given what the Court was going to take up but George Stoehner, who was here on December 2nd, is available by phone if that becomes necessary.

THE COURT: All right.

MS. WIPPER: Your Honor, if I can respond, some of the existing disputes are related to class issues. For example, we're requesting personnel action notices because of the errors that were found in the data, the HR data, that was produced. Essentially, the coding --

THE COURT: Why is that relevant to class certification?

MS. WIPPER: For our expert to do a statistical analysis and render regression analysis, they need accurate data, including payroll data, which we don't have, which is also in dispute.

THE COURT: Wait. Are you seriously telling me that for the something like 700 to 1,000 employees of MSL who are at issue here, you need the payroll data as to every single one of them for ten years or some lesser number?

MS. WIPPER: Yes, your Honor. To run a compensation analysis for regression, we often use payroll data to essentially compare what people are paid during the class period. So, yes.

THE COURT: All right, Ms. Chavey?

MS. CHAVEY: Your Honor, we have provided the payroll data and other electronic data but what we haven't provided, because it wasn't requested, was paper copies of the personnel action notices. And we advised plaintiffs' counsel that the

Box 5 data from the W-2s were not available electronically. We have of course records of the W-2s that were issued, but that is not electronically-held data. That is what was requested, was electronic-held data, and we have provided it.

THE COURT: All right.

MS. WIPPER: Your Honor, if I might, they haven't provided the data.

THE COURT: We're either going to do this in some organized fashion -- we have no more than an hour -- or you can come back this afternoon for the rest of this.

Instead of telling me what you need of this, is there a substantial part of what the letters in front of me have you each fighting about that will not need to occur if there is bifurcation, or not? Because, frankly, if you're going to say I want it all anyway, then I'm not going to bifurcate, the two of you are going to keep beating your heads against the wall with each other, and you'll do what you're going to do within the six months you have for fact discovery that are left.

MS. WIPPER: Your Honor, the HR complaints go to merits in order to show intentional discrimination, so those would not be at issue if there was a bifurcated schedule.

Also, in terms of the personnel action notices, that would be a part of it but not every personnel decision for every class member and every comparator. So it would limit the personnel records we would be requesting and it would also

limit the HR complaints, discrimination complaints.

THE COURT: What else? I've got several hundred pages of letters before we even get to the dueling ESI protocols.

MS. WIPPER: Well, in terms of the motion to compel letters, I think that was the only two issues that -- oh, there was one other issue, the personnel file of the president, and that would be a part of the class discovery, because as part of the common issue --

THE COURT: Well, it doesn't sound like we're gaining much by bifurcating. So you all are going to swim or sink with this, but I am going to enforce 26(b)(2)(C) proportionality. So let's go through the letters in detail.

I'm starting in chronological order with the December 27 letter, page 4, documents regarding complaints of discrimination. How are those kept, Ms. Chavey, in the HR department?

MS. CHAVEY: Your Honor, to the extent there are complaints of discrimination, yes, those would be held by the HR department. The requests are much broader than that, as we have described in our letter.

THE COURT: All right, so let's now deal as to subject matter, gender discrimination by females and sexual harassment complaint by females. That's the Court's ruling. Anyone want to argue against that?

MS. WIPPER: No, your Honor.

MS. CHAVEY: Your Honor, as to the sexual harassment piece of that, there is no claim of sexual harassment here, and that's why we have objected.

THE COURT: It's similar enough. That's the Court's ruling.

Time period?

MS. WIPPER: If I may make a comment: Plaintiffs would be willing to limit the time period to 2005 to the present, which is the longest statutory period applicable in a case under the New York Equal Pay Act. It is also consistent with --

THE COURT: But what has this got to do with the Equal Pay Act?

MS. WIPPER: If there were complaints made about pay discrimination --

THE COURT: OK, but that's a different discrimination; we haven't even talked about that. If you want to do it in two periods, pay discrimination '05 to whatever gets us back into the Title 7 time period and other gender and sexual harassment in a more limited time period, that sounds more reasonable.

MS. WIPPER: OK, and I would also direct the Court to -- there is case law allowing plaintiffs to get --

THE COURT: I understand, but you're also getting many years' worth of information. Any problem with -- what's our Title 7 or state parallel statute of limitations?

MS. WIPPER: February 2008 to the present.

THE COURT: So February 2008 to the present, does that work for the defendants?

MS. CHAVEY: Yes.

THE COURT: And what's the first date in '05?

MS. WIPPER: It would be February 2005.

THE COURT: All right. And February 2005 only for complaints that deal with pay discrimination.

MR. ANDERS: Your Honor, if I may, the one concern I would have about 2005 -- and this was shifting a little bit in the ESI realm -- is the emails that --

THE COURT: Wait. How are complaints to HR kept? Let's start with that. That's what we're talking about.

MS. CHAVEY: They're kept in different ways. There may well be emails relating to complaints or relating to the company's responses --

THE COURT: Do you know how this is done, or are we doing a law school exam?

MS. CHAVEY: Yes, no, we have investigated this.

THE COURT: Are there paper files?

MS. CHAVEY: Yes.

THE COURT: And in what form may the emails take? An email to HR from an employee?

MS. CHAVEY: Or between HR people.

THE COURT: Fine, that seems like it's easy enough to

search. OK, that's the Court's ruling.

Pay discrimination, February 2005 to date -- well, to date? Let's cut it off at the date the complaint was filed, which is what?

MS. WIPPER: February 24th, 2011.

THE COURT: OK, so through February 24, 2011. And gender and sexual harassment discrimination by females February '08 to the date of the complaint.

MS. CHAVEY: Your Honor, just to clarify to pay discrimination, is it your order that the complaints at issue would be pay discrimination based on gender or any complaint about pay?

THE COURT: No, pay discrimination based on gender.

I think that takes care of all of the complaints of discrimination, yes?

MS. CHAVEY: Yes.

MS. WIPPER: If I could just have one point of clarification: The defendants wanted to limit it to complaints against presidents and managing directors.

THE COURT: No, complaints.

OK, next: Personnel decisions -- and this gets back to -- I'm not exact sure what it is want. So tell me what you want.

MS. WIPPER: If I could direct the Court to page 7, there are some examples of what we are looking for. For

example, the first bullet point addresses the personnel action notices that I have already referenced. So we're interested in those for two reasons; one, to correct the data, two, because --

THE COURT: Let me just stop. Are those paper?

MS. CHAVEY: Yes. They're in the personnel files.

THE COURT: Any problem with producing them?

MS. CHAVEY: Yes. There are a thousand employees as well as former employees, and to pull all -- these are the forms that are signed by authorized people to submit to payroll to approve a pay increase, for example, or a change of address or what have you. So these are not held in an electronic database; these are documents that are made part of the personnel files.

THE COURT: Assuming you had to do it for every one of the thousand employees and former employees, how much bulk are we talking about?

MS. CHAVEY: There could be a few a year. The request is -- these haven't been requested, by the way, to my knowledge. We did not interpret any of the requests to seek, other than the requests for the plaintiffs' personal files.

THE COURT: I'm now doing it this way because that's the way you both presented it. If you need 30 days because it's a quote-unquote new request, we'll talk about deadlines at the end.

MS. CHAVEY: But the request as it's stated in the letter is for any personnel action notice, which they call a PAN, relating to pay, job title or status. So sometimes there are personnel action notices that show that somebody goes from one department to another. Whether that's a status change, I don't know.

THE COURT: Is that what you want?

MS. WIPPER: For purposes of the errors in the data, we found errors in people's departments and their job codes and their status is terminated or active, full time or part time, so if they do reflect that, so for that purpose we would want it, but for purposes of this, within personnel files, we would only want --

THE COURT: But if you're getting it for some reason, you might as well get it through this. So that's what you want, a department change?

MS. WIPPER: Yes, your Honor.

THE COURT: So pay, job title, status, meaning department change. What else? Obviously --

MS. WIPPER: Promotions, terminations.

THE COURT: Well, that's pay or job title. Can you do this on a sample basis?

MS. WIPPER: Our understanding is that everything is maintained in HR headquarters in New York, all personnel files. We had a plaintiff --

THE COURT: But to have to go through it for thousands of employees for a long period of time, unless you're telling me that that's what your experts demand in order to do the regression analysis, that's not the way it should be done in discovery. What is it you need this for?

MS. WIPPER: To correct the data, your Honor. And there's case law supporting the fact that if there are errors in the data, it shouldn't be held against a plaintiff or the other party and they shouldn't be denied discovery --

THE COURT: Are you willing to pay for this? We're going to start turning this into a pay-for-play if you can't be more reasonable.

MS. WIPPER: We would be willing to discuss sampling as long as it's a significant sample, statistically significant sampling, and random.

THE COURT: Statistical significant sample is probably 10 percent of the employees or something like that. Is that what we're talking about?

MS. WIPPER: And we would also like to ask for additional notices; if we find errors while we're doing the analysis of the data, we would like to have the opportunity to get additional notices as well.

MS. CHAVEY: Your Honor, that's actually the other way that we would propose to do this. And we had talked with plaintiffs' counsel before, about identifying the errors, to

see if we could then confirm whatever the supposed conflict was in the data that was provided. It didn't sound, from our discussions, like it was more than a handful of alleged errors. And if that would be a way of doing it, then we could work with just whatever the errors were that came up.

MS. WIPPER: But, your Honor, we have seven plaintiffs, and pretty much every single one of them has an error in the data. So it's hard for us to know how widespread --

THE COURT: An error about what?

MS. WIPPER: One plaintiff is listed as full time, when she's part time; one is listed as current when she's no longer working there, another is listed as has resigned but she was terminated, her job was eliminated; two were listed as taking severance when they didn't; one her job code was incorrect. So --

THE COURT: All right, you're going to do the personnel action notices.

Now, what time period are you talking about?

MS. WIPPER: The same time period as the employment data?

THE COURT: Well, we're not doing the pay discrimination, period, for this. So February 2008 to the complaint on a statistical sampling basis.

MS. WIPPER: Your Honor, will we also be able to ask

for additional notices if we find other errors in the data beyond the sample?

THE COURT: The whole purpose of this statistical sample is to avoid having to do it for all 5,000 employees or whatever it is.

MS. WIPPER: I'm not anticipating a thousand. I don't want a dispute later if there's like five people.

THE COURT: If it's a limited number, I'm sure both sides are going to be reasonable.

OK, the second bullet, promotion recommendation forms, what's the purpose of that?

MS. WIPPER: The purpose of the promotion recommendation forms is to show who approves the promotions. And our theory in this case is that there's a centralized decision-making process, kind of the opposite of Wal-Mart versus Dukes where a core group of managers, leadership team, makes the decisions.

THE COURT: Is there a dispute as to that? Now, whatever you all can stipulate to, you can save a lot of time and money on discovery.

But before you answer that, let me just interrupt for a minute off the record.

(Discussion off the record)

THE COURT: Back on the record. Continue.

MS. CHAVEY: So the promotion recommendation forms are

also -- well, let me say, they were introduced in 2008, they are used with regard to promotions of individuals to the vice president or senior vice president level, and these are also forms that aren't held in any centralized place; they are individualized forms and they are transmitted, as far as we have seen, by email. And they are also at times, although I don't think consistently, appearing in the personnel files of individuals. They're routed to human resources.

THE COURT: So assuming it's on email, is it then something that is saved in HR in a record, it's a business record, as opposed to just it's an email, hey, Joe, somebody just got a promotion?

MS. CHAVEY: No, it is a form that would be sent as an attachment to an email.

THE COURT: And that's easy to find via the email system?

MS. CHAVEY: No, I don't think it would be easy to find.

THE COURT: Then how does your company do business?

MS. CHAVEY: They use a lot of email.

THE COURT: I know, but this sounds like it's something that in the good old-fashioned, pre-electronic days would have been in the employee's personnel file. For the company to say, we don't do that anymore, we send it by email and then it's in an email system in a way we can't find it,

you're going to have to search. So it seems to me -- or who approves all of these?

MS. CHAVEY: Human resources.

THE COURT: So is the only approval signature on it going to be HR or is it going to show who in the business side management approved the promotion?

MS. CHAVEY: For this particular form, that changed over the years from 2008 forward, so there isn't one answer to that question.

THE COURT: Well, at what point does it show who approved it?

MS. CHAVEY: In HR, Rita Masini was a consistent recipient or signatory on these documents through the years.

THE COURT: If that is stipulated to? Is that sufficient for class purposes?

MS. WIPPER: With respect to HR, yes.

THE COURT: And what else do you need it for?

MS. WIPPER: I believe it also has to be approved by corporate, if it's a VP or an SVP, so it's not just --

THE COURT: Then can you stipulate that all of these were approved -- I don't even know what "approved by corporate" means.

MS. WIPPER: It means a businessperson, so a businessperson, someone outside of HR, the CFO or the president.

MS. CHAVEY: I don't think that's accurate. Again, this wasn't requested in the document requests. I don't have it in front of me.

THE COURT: You all manage to spend your Christmas vacation writing me huge letters, so I would assume that by the time you knew there was a conference on this, you'd know the information. You're either going to stipulate to what level of senior management had to sign these -- obviously if these are promotions to VP or senior VP, I would assume that the signature has got to be at a fairly high level.

MS. CHAVEY: Rita Masini is the chief talent officer, she's the top HR representative.

THE COURT: If a businessperson besides HR has to approve all of this, you are going to either stipulate sufficiently that it satisfies the class certification issue and gets around the Wal-Mart issues or you're going to have to go through, from 2008 to the date of the complaint, on a sampling basis and produce these.

MS. CHAVEY: Because this form changed over time, your Honor, I'm not in a position to stipulate today --

THE COURT: You don't have to do it today.

MS. CHAVEY: OK.

THE COURT: You have to either produce these or stipulate, and by whatever the deadline is that I'm going to set at the end of all of this.

OK, request for raise exceptions?

MS. WIPPER: And I think this one also would -- the stipulation we're proposing would work here. Essentially what this request relates to is, there's a global salary freeze that was implemented by the parent company, Publicis Groupe, for all subsidiaries during the class period. There was also exceptions to that salary freeze, there was also a promotion freeze and a hiring freeze. And those exceptions were essentially sent from MSL, the subsidiary, to the parent.

THE COURT: One second. Since you're getting the personnel action notices, what do you need this for?

MS. WIPPER: This shows the approval process for pay increases that we're also challenging. So it shows commonality because not only is it nationwide, it's global, and there was exceptions to the freeze that we believe had a disparate impact on women.

THE COURT: So for what employees are you looking for this?

MS. CHAVEY: Just the public relations employees in the United States.

THE COURT: Then, I'm sorry, the personnel action notice is going to show you when somebody got a pay raise. What do you need this for?

MS. WIPPER: This shows the approval process --

THE COURT: Who cares?

MS. WIPPER: -- for commonality purposes. For the same reason as the promotion recommendation.

THE COURT: At this point you're going to move for commonality, and when they say there isn't, we can revisit this.

MS. WIPPER: OK, your Honor.

THE COURT: If they argue that the raise exceptions were signed off on by different people, they're going to have to say who.

So your fate, MSL, is in your hands. All of the emails on all of this? No, enough is enough. So that's the end of this one, as far as I'm concerned.

Anything else you want to argue for in this area before we go to page 8 and item number 2 on pregnancy?

MS. WIPPER: No, your Honor.

THE COURT: Anything from the defense?

MS. CHAVEY: No.

THE COURT: OK, pregnancy, what's the fight here?

MS. WIPPER: During one of our meet-and-confer conferences, we asked for a list of the employees who were pregnant during the class period, which we believe would be less than a hundred, probably 60, people. Defendants' response was that that was captured in the employment data by the leave that the employees took. But that's not completely true. We have a plaintiff who was put on a probation letter after she

announced her pregnancy and is claiming a pregnancy discrimination claim as a result of that.

THE COURT: But where is it you believe that they have records on pregnancy?

MS. WIPPER: It's our understanding that HR is informed when there's an announcement of a pregnancy, and that's based on anecdotal evidence we have heard from our clients.

THE COURT: Ms. Chavey?

MS. CHAVEY: Your Honor, it may be that HR is informed when an employee becomes pregnant. Certainly HR is informed when an employee announces her intention to take a leave related to pregnancy. But there isn't a centralized list or any document that reflects this information that's being requested. And the difference here is, I believe the plaintiffs acknowledge that they have information about all of those employees who took maternity leave; the only question relates to employees who were pregnant but didn't take a leave for some reason, so maybe they left before they had the child or something like that.

So we don't know of a document that answers that question.

MS. WIPPER: It's our understanding we have anecdotal information that an employee in the L.A. office notified her immediate supervisor that she was pregnant and she was called

the next day by Tara Lilly and the HR director in New York to --

THE COURT: Why don't you do this: Why don't you depose the HR person. You've already got the information about those who took leave, correct?

MS. WIPPER: Yes.

THE COURT: OK. What else do you want at this point? Otherwise, you're doing in essence a trial on a hundred anecdotal stories, which doesn't make it satisfactory for class certification anyway.

MS. WIPPER: Yes, your Honor. In order to look at whether there's a pattern for women who were pregnant, whether they did not receive promotions or pay increases or left the company --

THE COURT: How about in addition to the statistical sample we're doing of the personnel action, notices and the promotion recommendation forms, if those get produced, you add them to the statistics? In other words, if we're doing 15 percent of the thousand public relations people as your statistical sample, in addition to that number, you get the personnel action notes for the hundred people, if that's what it is, who took a maternity leave.

MS. WIPPER: OK.

THE COURT: Yes?

MS. WIPPER: Or who announced their pregnancy?

THE COURT: If you have any record of that, sure. They don't apparently.

All right, that's it for pregnancy.

Comparators and key players?

MS. CHAVEY: Your Honor, on this request, we have agreed to provide comparator data and we have provided comparator data. The difference of opinion or the dispute here appears to stem from some additional names that the plaintiffs included on request 50. And we asked why these people were included, and they didn't explain why they were included other than saying some of them were women whom they believed to have been discriminated against or other things, or maybe they were comparators in 2004, but they aren't within the scope of discovery, in our view.

THE COURT: All right. Ms. Wipper?

MS. WIPPER: The list included comparators, which obviously there's a dispute with, who's an appropriate comparator in every discrimination case. So I'm unclear about whether or not defendants are willing to produce everything that we say is a comparator, to --

THE COURT: How about you two not only listen to each other outside of court but in. Ms. Chavey said there was a list of names they gave you that they said we don't know why you've put these people on a comparator list, and other than that, they have no problem giving you your comparator list.

So, I don't know who any of these folks are. Why don't you educate me or drop the people that they object to for now without prejudice to coming back to it later, or play the old split-the-baby. Tell me what you want, educate me here.

MS. WIPPER: With respect to the women on the list, they were women that we have information complained about discrimination or --

THE COURT: Then why are they comparators?

MS. WIPPER: They are not comparators; they were in addition to the comparators on the list.

THE COURT: Are you doing individual discovery for absent class members?

MS. WIPPER: No. We're just interested in specific instances of discrimination, because if we just --

THE COURT: If there isn't a pattern and practice, there isn't class certification and what happened to these other people is irrelevant. Right?

MS. WIPPER: Well, your Honor, at the class certification stage, I'm sure defendants will argue that we have to prove not only the statistical disparity but also anecdotal evidence, including specific instances of discrimination.

THE COURT: Well, the anecdotal will come from what your clients tell you and what your clients point you to as to other people to contact. So at the moment, those people are

off the comparator list without prejudice to you coming back for them before class certification.

MS. WIPPER: That's with respect to the women listed?

THE COURT: You two have to work this out --

MS. WIPPER: OK.

THE COURT: -- because nobody has given me a list in any way that puts it in a way that I can deal with it.

That's the Court's ruling. You both understand it?

MS. WIPPER: Yes, your Honor.

MS. CHAVEY: Yes.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: OK, President Tsokanos' personnel file?

MS. WIPPER: Yes, your Honor. Plaintiffs believe this is very important because the president is at the center of a lot of these claims.

THE COURT: As to comments he allegedly made, I have no problem giving you that. Other than that, I'm not sure why you should get anything else.

MS. WIPPER: Well, we're aware there were complaints made against him, so --

THE COURT: You can have any comments, any sexist comments he made, any complaints against him for sexual-related issues, gender or sexual harassment. What else?

MS. WIPPER: Could I also request that that not be

limited to the time period we already discussed, given the importance --

THE COURT: No, no.

OK, anything else on that?

MS. WIPPER: Can I just clarify what the time period will be?

THE COURT: The time period is February 2008 to the date of the complaint.

Any argument on that by the defense?

MS. CHAVEY: No, your Honor.

MS. WIPPER: If I can just state for the record, we're aware of a complaint against Mr. Tsokanos I would say around 2005.

THE COURT: For what, by whom?

MS. WIPPER: Sexual harassment. And our allegation would be that despite that complaint, he was promoted, and promoted quickly, by passing women who were comparable to his position.

THE COURT: But I thought your argument is that once Mr. Tsokanos became the president, he forced women out and did other terrible things. So what's the point of what happened to a complaint and then despite that complaint he got promoted?

MS. WIPPER: Because it shows his attitude and motive towards women, so within those documents it would show what type of complaint was made against him.

THE COURT: What type of complaint was that '05 complaint you're referring to?

MS. WIPPER: Sexual harassment.

THE COURT: By who? Who was the complaint made to?

MS. WIPPER: It was when he was a managing director in the Atlanta office.

THE COURT: Who made the complaint? Was it to HR?

MS. WIPPER: It was to HR.

THE COURT: Well, is that something that can be readily found, Ms. Chavey?

MS. WIPPER: Yes.

THE COURT: OK, produce that.

Other than single complaint, the time period is February '08 to date.

MS. WIPPER: All right, your Honor.

THE COURT: OK, that, I believe, takes care of plaintiffs' December 27 letter, correct?

MS. WIPPER: Yes, your Honor.

THE COURT: OK, so now we go to your December 29th letter.

MS. CHAVEY: Your Honor, as to this letter, which is a request for a conference, we had intended to file a written response; we just haven't done it yet.

THE COURT: You can respond orally.

MS. CHAVEY: OK.

THE COURT: On the compensation data, do you really want paper copies of a thousand people's W-2s for three, four years?

MS. WIPPER: No, your Honor, we just want payroll data. It's not paper copies that we're interested in. We're just interested in the records that of what people were actually paid. What we currently have now is bonus data, which had to be reproduced because it was incorrect, and then also the annual rate of pay, which is the rate assigned to an employee but it's not necessarily what that employee was paid that year.

MS. CHAVEY: Your Honor, we have told the plaintiffs' counsel that we have the W-2s, we have copies of those things, but we don't have an electronic database that contains the Box 5 information.

MS. WIPPER: In lieu of the W-2, we would take payroll data, so --

THE COURT: I'm sorry, I don't know what that means.

MS. WIPPER: There's the HR data, which essentially captures all of the personnel action changes, so any time someone gets an increase, is promoted --

THE COURT: Just tell me what the payroll data.

MS. WIPPER: That's how they process their paycheck every two weeks, so that's a separate database that has all the deductions listed, the total earnings, and then that data is

fed into the W-2 data, which is what's reported to the IRS.

MS. CHAVEY: I don't know, this is the first that I'm hearing this explanation of what the payroll data is that's being sought.

THE COURT: Who does the company's payroll? Is it internal or ADP?

MS. CHAVEY: They have a payroll department, and I haven't posed this question.

THE COURT: See what you can find out on that. We'll leave this as: Produce it if it's electronic, if you're telling me after you investigate -- you'll be telling Ms. Wipper if it doesn't exist, you'll work it out.

OK, I think that brings us to requests 6 and 11, about org charts among other things.

Does your company really not have org charts?

MS. CHAVEY: We do have org charts.

THE COURT: Were they produced?

MS. CHAVEY: We have produced some and, as we have told plaintiffs, we are continuing to produce org charts that we find.

THE COURT: How long does it take?

MS. CHAVEY: We have been very, very diligent in going through a huge volume of documents, both electronic and paper, and we have told the plaintiffs' counsel -- you know, by the time these issues were raised, your Honor, the September 9th --

our responses to the September 9th discovery requests were about two and a half months old, there were 93 requests, many of them pertained to the individual plaintiffs, many of them were very, very broad. And we have been working very hard to get through them and we have told plaintiffs' counsel that we have not asserted that we have completed our disclosures.

If it's taking too long, from their view, we apologize to them, we apologize to the Court, but we are working through it.

THE COURT: All right, produce it.

MS. WIPPER: Your Honor, if I can make one comment: These org charts were requested eight months ago and were ordered by Judge Sullivan to be produced four months ago.

THE COURT: Did he set a deadline or, rather, four months ago, he said you've got to produce it?

MS. WIPPER: Yes, your Honor.

THE COURT: Well, part of the problem is, if they're going through lots and lots of data, we're now at the point where objections are gone, it's time to produce; and once I order you to produce something, if you don't, you will be sanctioned, personally as well as your client. So whatever dilatoriness or game-playing that plaintiff suspects was going on is now over. So we will set a deadline for all production or at least all paper production at the end of this conference.

I think I'm now over to page 5, which are specific

types of documents.

MS. CHAVEY: Your Honor, when we were here on December 2nd, you asked or directed plaintiffs' counsel to let us know, in light of the ambiguity of the term "reorganization," you asked them to let us know what specific decisions they were seeking, and they didn't do that. We did follow up with them to ask them to do that. The first we got this was another midnight email on December 29th, with this page 5 of bullet-pointed items. But we didn't have this before. We sought to do that --

THE COURT: Now that you have got it, do you understand what they're looking for and do you have any objection to searching for it, to any of the bullet points on page 5?

MS. CHAVEY: Some of them are very vague. For example, the third bullet point, documents relating to restructuring plans, we're not sure if what the plaintiffs are asking us to do is to use a keyword search in the electronic data using the term "restructuring plans" or whether there's something else, but there's not a folder in somebody's desk that says "restructuring plans" on it.

MS. WIPPER: Your Honor, defendants produced PowerPoints to us that had several pages with the heading called "Restructuring" --

THE COURT: The question nowadays, in an ESI world, is

how one is going to find the needles in a haystack or the haystack, so you all have to work on that. And that sounds like the ESI protocol issue that hopefully we'll have time to get to this morning.

MS. WIPPER: Your Honor, in our keywords that we proposed --

THE COURT: So "restructuring" is presumably one of them.

MS. WIPPER: Yes.

THE COURT: So that will turn this up.

Anything else? Let's go off the record a minute.

(Discussion off the record)

THE COURT: All right, back on the record.

Any of these other bullet points, other than word search or whatever ESI protocol we're going to use, seem to be a problem?

MS. WIPPER: I just want to make one comment. All of these documents cited here are Bates labeled MSL, not MSLAX, meaning that it's not a part the Recommind platform that they're using on the ESI protocol. So I just want to clarify, or have defendants clarify, that they would also look outside ESI for any of these documents.

MS. CHAVEY: Of course, of course we would do that.

THE COURT: OK.

MS. CHAVEY: One other kind of general issue with

these particular bullet points, which again we saw for the first time just a couple of days ago, is the time frame covered because I believe the plaintiffs are intending for these requests as they have now been specifically articulated to go back to 2001, which, in our view, is an overly long period of time, and unreasonable under the circumstances here, and given what the allegation is of the --

THE COURT: What time period do you suggest?

MS. CHAVEY: I would suggest February 1 of 2008 forward.

THE COURT: Ms. Wipper?

MS. WIPPER: That's fine -- well, I would suggest January 1st because that's when James Tsokanos was promoted.

THE COURT: OK, fine. January 1, 2008.

MS. CHAVEY: And, your Honor, as to some of these other bullet points, there are just a lot of words in here that are in quotes -- management structure approved, new business team, reductions, terminations. These are words that we will work with the plaintiffs in the course of the ESI protocol to uncover, and we'll do our best in terms of hard copy documents.

THE COURT: OK, very good.

That concludes this letter, other than the sanction requests are all denied at this time without prejudice to the possibility that if the Court thinks there is gamesmanship going forward, that the Court will go back retroactively to

this period as well. Otherwise, let's all just get along, as the old saying goes.

I believe that your January 3 letter on the defense side was just responding to plaintiffs' letter; and therefore we've taken care of that, correct?

MS. CHAVEY: Yes. Our letter on January 3rd related to the plaintiffs' letter from December 27th. We had not yet responded in writing to the --

THE COURT: Which you don't have to now.

MS. CHAVEY: OK. Thank you.

THE COURT: On the ESI protocols, we have ten minutes before I'm expecting a telephone emergency conference call from one of my other favorite cases.

I'm not sure what your difference is. Literally, I got plaintiffs' this morning when I came in, to find that you broke my fax machine with a paper jam. I have skimmed it but I'm not really sure what the difference between the two parties' plans are and what we need to do, perhaps put you, either with your consultants or maybe your consultants without the lawyers, in the jury room for an hour and see what you all can work out.

MR. ANDERS: If I may, your Honor?

THE COURT: Yes.

MR. ANDERS: I think there are a few main areas -- some we may have already addressed -- one of which is the

overall time period. As it relates to the emails, where we have pulled the data from is, in 2007-2008 the company put in place a long-term archive which captured every incoming and outgoing email. That is the data set that we pulled from to get the 3.2 million documents.

So, for purposes of a protocol that we have proposed a 2008 going forward as the time period, plaintiffs' protocol went back to 2001. I understand from some of the Court's rulings today that 2008 is the time period with the exception of the EPA claims, which went to 2005.

THE COURT: So any problem with using January 1, '08 for this search?

MS. WIPPER: With respect to email only, there is not a problem, but our protocol is much broader than email.

THE COURT: All right. Well, on the email side, January 1, '08.

What else?

MR. ANDERS: Custodians, your Honor. Our list had included 36 custodians. That list was higher than we initially intended. We had made some additions after we received --

THE COURT: Does it include all the HR people, since a lot of this data seems to be in HR?

MR. ANDERS: Yes, it does now. That was one of the later additions once we received plaintiffs' definition of who the class A custodians are. The list is the senior executives,

the managing directors of the various offices, some of the plaintiffs' intermediate supervisors, I believe it has all the HR people.

THE COURT: How many people are in plaintiffs' list?

MS. WIPPER: 47.

THE COURT: Is that a difference of 11, or is it a bigger difference because you don't want some of their 36 or whatever?

MR. ANDERS: I have a difference of 12, your Honor. They had removed four people from our list of 36. They added 18 and then very recently took two more people off, so it's a net --

THE COURT: Who are the 12 that are now in dispute? I've got your respective custodian lists in front of me.

MR. ANDERS: Your Honor, I can tell you the 12 in dispute right now.

THE COURT: OK.

MR. ANDERS: If you look at plaintiffs' ESI protocol.

THE COURT: Yes.

MR. ANDERS: Well, my version is a redline version which is page 11, but if you look at the section which lists their custodians --

THE COURT: Yes.

MR. ANDERS: -- from Scott Bedowin down, who I believe is number -- I think he's number 30 on mine.

THE COURT: Got it.

MR. ANDERS: So from him down, with the exception of Merrill Freund and Lance Breisen, those people are all new people.

THE COURT: All right. Two questions: Mark Hass, former CEO, when did he leave?

MS. WIPPER: 2009.

THE COURT: So we're talking about a year-plus. Well, to the extent that some of these are managing directors in what I guess are branch offices -- Seattle, Atlanta, Boston, Detroit, Chicago maybe -- any objection to them?

MR. ANDERS: I guess, your Honor, my concern would be, and what I had said to plaintiffs' counsel, was the database with the 3.2 million documents --

THE COURT: Do you have any idea as to how many would be added if these 12 were tossed in?

MR. ANDERS: We have not collected those, so I don't know what their size is. One of the things we have encountered with this case is because of the extent to which email is used, the email accounts individually were a lot larger than we have anticipated in the past.

THE COURT: But once you do some screening of them, you'll reduce it down.

MR. ANDERS: Understood.

THE COURT: Unless somebody can give me an argument --

and I know there is some argument that I saw somewhere in somebody's letter, about the three or four people from Winter & Associates, but for the internal MSL people, I'm not sure what difference it makes.

MS. WIPPER: Your Honor, if I could address that, the Winter & Associates is part of MSL Group that was folded in as part of the reorganization.

THE COURT: When were they folded in?

MS. WIPPER: 2008/2009. We have been in contact with employees of Winter & Associates, and we believe that they are subject to similar policies and practices and --

THE COURT: As of when they were folded in?

MS. WIPPER: Correct.

THE COURT: And they are also public relations --

MS. WIPPER: Correct.

THE COURT: -- staff?

MS. WIPPER: Correct. They are not named plaintiffs but they are --

THE COURT: Can your named plaintiffs represent these people?

MS. WIPPER: They're part of MSL Group, and from the organizational charts that we have --

THE COURT: If they are part of MSL Group, then it seems to me you should not be looking at them separately. And I am certainly concerned with somebody who has the title of

general counsel.

So either they're the same as everybody else once the reorg hit, in which case I don't see why you're targeting these folks specifically, or they're different, in which case I'm not sure you've got a plaintiff with standing. What am I missing?

MS. WIPPER: They're part of the MSL Group, they share an office with MSL in L.A.

THE COURT: At this point I'm denying the three people from Winter. So that gets our group of difference down to nine. What do you all want to do about it?

MR. ANDERS: Your Honor, I would request that of the people that we had proposed, that we discuss, or plaintiffs suggest, people that could be removed. I would like to try to keep the database as close to the size it is now without --

THE COURT: In other words, is the 3.2 million you've referred to before or after the deduping?

MR. ANDERS: It's after deduping and deNISTing.

MS. CHAVEY: Your Honor, if I could also address a number on my list, it's number 41, which is Don Lee the managing director of PBJS Chicago?

THE COURT: What is PBJS?

MS. CHAVEY: PBJS is part of MSL Group but it is not a PR agency; it's a very eclectic kind of media company, and it operates separately and it is not part of the public relations business of MSL Group.

THE COURT: Why do you want Mr. Lee, Ms. Wipper?

MS. WIPPER: Because he is part of MSL Group. And he's -- we were never told by defendants that they were not a PR agency. We have asked --

THE COURT: Now you have been told they are different from the rest. Do you still want Mr. Lee?

MS. WIPPER: Yes. And I would propose that --

THE COURT: All right, you're not getting Lee.

MS. WIPPER: OK.

THE COURT: Let's narrow this list.

MS. WIPPER: Can we reconsider Winter & Associates because the organization --

THE COURT: No, no, not at this point without further evidence as to why your plaintiffs have standing to deal with this other than if Mr. Tsokanos and others in senior management of MSL were discriminating against women during this period, in which case it doesn't matter what Winter was doing.

MS. WIPPER: Well, I have an org chart right here that shows that Winter & Associates reports right into Jim Tsokanos.

THE COURT: OK. So what?

MS. WIPPER: So they're part of the leadership team that are making the decisions.

THE COURT: I don't know what a leadership team is in this capacity.

MS. WIPPER: It says leadership team at the top of the

organization chart.

THE COURT: Let me see the chart.

I'm missing this. Where is Winter on here?

MS. WIPPER: It's in the box at the bottom. I think it's sort of in the middle.

THE COURT: Well, it's various people who report to Masini, et cetera.

MS. WIPPER: No, it reports through that top layer to Jim, if you see --

THE COURT: Yes, it reports to Masini, and Masini reports to Tsokanos. So does Canada and various other things. So what?

OK, denied at this time without prejudice to renewal at some later point.

MR. ANDERS: Your Honor, I guess, going down the list, the first person that I guess I would take issue with, based on how we're doing this is, Scott Bedowin. He's an SVP of Global Consumer Marketing, not at that MD or HR type level that we were considering, so I think he should come out.

THE COURT: OK, what's his role?

MS. WIPPER: Your Honor, defendants have decided to put in the immediate supervisors of our plaintiffs. We didn't request that. What we have done is put in comparators to our plaintiffs, and we had a plaintiff who was --

THE COURT: If he is a comparator -- and this is email

searches that apparently are going to be run across everybody's email -- you're going to get a lot of stuff from so-called comparators that isn't relevant, it doesn't make sense to do it as a uniform group. If you want to say that you've got certain comparators who you want different searches run on, that's a different story. It doesn't make sense to pull all their material in because they're a comparator at the same level.

MS. WIPPER: We would agree to that.

THE COURT: All right, my 12:00 o'clock call has called in. I have lunch at 1:00. I'm hoping this won't take long. Do you all want to just sit here or do you want to go into the jury room and maybe work out some of these issues? Go, lawyers and consultants, as needed, into the jury room. Do not leave there. We will come get you after I deal with this call.

(Recess)

THE COURT: OK, it's somewhere between 12:40 and 12:45. We're back on the record after my other conference.

What progress have you made? Or perhaps the other way of looking at it is: What is it in the 15 minutes we have left before lunch that you want me to rule on or give you advice on with respect to the ESI protocol?

MR. ANDERS: Your Honor, we spent the bulk of the time talking about the custodian list. We have identified five custodians that are, I think, more on the either comparator

category or secondary category where I think your Honor suggested that maybe those email accounts get filtered prior to being put into the database -- that's what we were trying to understand -- but we have identified five where at least plaintiffs would be willing to apply some type of keyword search in the filtering to them first.

THE COURT: All right.

Ms. Wipper?

MS. WIPPER: With respect to the custodians, I believe that the parties would be able to work it out. What we would like to hear from the Court is your view on the differences between the two protocols. Our protocol is --

THE COURT: I have no idea.

MS. WIPPER: OK.

THE COURT: When you send me 50 pages each, late at night and/or the morning of, when you knew this conference was scheduled for quite some time, there's a limit, and it was not done as a redline or anything else as to where your differences are. So you tell me what it would be most helpful for you, for the ten minutes or so we have left, to rule on or advise on, and I'll deal with it.

MR. ANDERS: Your Honor, I think that the key issue is how we use predictive coding, and that's where there's probably -- that's why we have our experts here, our vendors.

The way defendant MSL proposes using the predictive

coding process would be as follows: We start with an initial random sample, with a confidence level of 95 percent, with an interval of plus or minus 2 percent. With the 3.2 million document database, that random sample is 2,399 documents. We have gone through those preliminarily. I had associates go through those; I just finished going through it last night.

Of that 2,399 --

THE COURT: Just to stop you right there, my understanding of predictive coding is that the coding, as painful as it is, should be done by a very senior attorney, meaning partner level or very senior associate, not the usual team of umpteen lower associates with a lower billing rates.

MR. ANDERS: That's why I reviewed it, your Honor.

THE COURT: Well, as "reviewed it" as every one of the coding decisions or spot-checked it?

MR. ANDERS: No, where I am right now is I have gone through every one that was marked as relevant, I went through 400 so far that have been coded as not relevant, and I intend to go through all of those but I first looked at the ones that were relevant.

THE COURT: At the end of the process, you're going to have done every single one of the --

MR. ANDERS: Yes.

THE COURT: Then I'm not sure why your client paid for someone else to do it first, but that's not my problem, that's

their problem.

OK, continue.

MR. ANDERS: So far 36 were deemed relevant. Of the 400 not relevant I have reviewed, they were clearly not relevant. So right now the baseline is .015 percent of that random sample was relevant. If you translate that to the entire database, that's 48,000 documents.

After we did a random sample, then what we have done at the same time is we have applied keywords and we have taken the results of those keywords and sample-coded. So, for example, if there's a keyword "reorganization," we may have reviewed the top 200 random hits. We did that across the board.

Also, to respond to several of plaintiffs' targeted document requests, we ran targeted searches across the database. That's what we have already produced, about a thousand pages of documents. So we have that coding that's in there.

Plaintiffs' counsel, they have sent us now three different revisions of keywords. What I have proposed to plaintiffs' counsel is, I'll give you the hit lists. I've already given them two sets of hit lists; we have another set to give them, I'll review -- or we'll review 3,000 of those hits, you tell us how you want us to review it but pick the hits, we'll review any of the top 200 in these ten categories,

you tell us how to review it. We'll give them those results as well.

Once that initial coding part is done, we'll let the system go out, it will do a sample of, you know, train itself, we'll get the results. Our proposal was to review, one, a random sample of the results that come back as well as certain judgmental sampling, share those results with plaintiff, they can make their suggestions on how certain things should be coded.

We have also identified six different categories that documents can be coded towards. I think plaintiffs have asked for us to do eight or nine. We can figure that out. Go through that iterative process twice. At that point -- and this is where sort of the proportionality and cost-limiting comes in -- after we've gone through the iterative process twice or if we have to go through another time, have the computer give us the documents in rank order. And we have agreed or proposed reviewing the top 40,000 rank documents. And we arrived at that 40,000 document number -- we estimate it will cost approximately $200,000 using a five-dollar a document cost estimate, it will cost 200,000 to review the 40,000.

When you take that 200,000 in review costs and you couple it with our vendor costs, we're looking at a total spend of approximately 550,000. We understand that plaintiffs take issue with some of our vendor costs -- we can dispute that --

but even just looking at the $200,000 attorney fee review cost, we think that that is a more than appropriate amount to spend to see what we get. We have never told plaintiffs that we're going to do this and this is all that you get. Our view is, let's see what this yields us first, we think these are the most relevant people, this is a sophisticated and excellent way to find the cream of the crop, if you will. And after that process is done, we'll be in a much better position to argue and debate whether or not the incremental value of searching another custodian is going to be worth the cost. And that's essentially our view.

THE COURT: Let me hear from Ms. Wipper.

MS. WIPPER: Your Honor, we disagree with defense counsel's position that the only issue is predictive coding, because that kind of skips over a lot of other issues that --

THE COURT: Well, let's deal with the predictive coding piece. I understand, from what little I have skimmed of your proposal and theirs, that they're sort of only looking at an email archive and you want lots of other steps looked at.

But assume that that other piece gets resolved, meaning where they have to look, and maybe their 3.2 million database will double or go up to whatever, but what's wrong with the predictive coding methodology they have proposed, which also sounds like it's being run on a fairly transparent and cooperative basis?

MS. WIPPER: Well, the main issue is cost because --

THE COURT: No, but where? In other words --

MS. WIPPER: It's impacting the methodology.

THE COURT: Well, the question becomes the review. And my understanding of the way this works is by the time that the system spits this out, and whether it's the top 40,000 or whether the break point is 50,000 documents or 30,000, that 90-something percent of the relevant documents are going to be found in the top hits, and that the costs of reviewing the rest is not worth the candle in most cases.

Now, where that line gets drawn is something that I can't decide until I've seen the results. In other words, when one sees the results, as I understand it from this method, one can see a sharp drop-off at a certain point, at which you then still sample the documents that are not going to be reviewed, and that's part of this whole iterative process.

If you are seeing that the top 40,000 documents give you 90 percent of the responsive documents, and it's going to cost a million dollars to go to the next hundred thousand documents for eyes-on review, to get another 5 percent, it's probably not worth it. If it's worth it to go to the top 50,000 because that's where the cliff line seems to be, that's what people are going to have to do.

It also may be that once privilege is determined, that they will let you -- the rest of this is so likely to be junk,

that you want, under an attorneys'-eyes-only or some process, an informal basis, you want to look at the documents that go from 40,000 to 80,000, you can look at them and if you tell them, you know, gee, having looked at it, there's a lot of good stuff here, then there's some problem with the process.

I'm not saying 40,000 is the cutoff -- I can't really determine that -- and I invite both sides' experts to tell me if I've gotten this wrong but I've sat through a lot of training sessions on this, wherever that cliff is, that where is where the break should be. So if that was the only problem you had with that part of the predictive coding process, then it sounds like you all can go down this road, all of this, without prejudice to additional search as may be necessary and additional processes as may be necessary.

So is that the only problem, Ms. Wipper, or is there anything more?

MS. WIPPER: No, there's a dispute about the scope of relevancy. What happened --

THE COURT: I've ruled on that. That's what we spent the morning doing.

MS. WIPPER: OK.

THE COURT: So whatever rulings I gave on that are going to apply to the emails as well. So any positions they were taking in the ESI protocol are now going to have to be revised, based on what I have done this morning, and similarly

on your side.

MS. WIPPER: OK, and also I'd like to respond to defense counsel's description of their proposal. I'd like DOAR to respond and give you an overview, if we may, on our proposal on predictive coding.

THE COURT: All right, though I guess I'd like to know where it differs.

MS. WIPPER: Well, it's actually a direct response to their proposal.

THE COURT: OK.

MS. WIPPER: So who am I going to hear from?

MR. NEALE: Paul Neale, your Honor.

THE COURT: Mr. Neale?

MR. NEALE: I actually think you pointed to exactly the issue. We have not taken issue with the use of predictive coding or, frankly, with the confidence levels that they have proposed except for the fact that it proposes a limit -- the ultimate result of 40,000 documents before we have seen any of the results coming out of the system.

THE COURT: I've already said -- and I want to make sure that defense counsel realizes it -- I'm not buying your 40,000 as a pig in a poke. I understand the concept, but where that line will be drawn -- whether it's 40,000, 50,000, 60,000, 20,000 -- is going to depend on what the statistics show for the results.

MR. ANDERS: I guess, your Honor, that's why I stood up before, because I wanted to ask you something. I understand that that cliff line may be at 80,000 documents. The reason why we picked the 40,000 is what we're trying to do is also incorporate the cost element. We picked 200,000 as what we think --

THE COURT: Proportionality requires consideration of results as well as costs. And if stopping at 40,000 is going to leave a tremendous number of likely highly responsive documents unproduced, it doesn't work. Plus, of course once you have the predictive coding run, the cost after that is how much you're doing an eyes-on review of. And once you've weeded out the privilege documents -- and I assume you either have the 502(d) order or you will be providing one for me to sign off on, because I think in a case of this size, if you're not agreeing to one, you're committing malpractice -- how much money you spend thereafter is a result of how much you want to know what's in the documents or, putting it perhaps a different way, CYA. If the first 60,000 are clearly showing that they're highly relevant but you're running out of money after 40,000, don't review the other 20,000. That's up to you.

MR. ANDERS: We've considered that, your Honor, and I think the attorney-eyes-only type of agreement or designation may be appropriate here, because one of the concerns we have is, some of the plaintiffs are now working for competitors. To

the extent that they're seeing --

THE COURT: This is not a case where I assume, other than on anecdotal, that there is going to be much need for the individual plaintiffs to look at the documents. I'm sure you can all work that out.

Now, unfortunately it's 1:00 o'clock. I'm happy to have you come back. I've got a 2:00 o'clock, and there may be a 3:30 from people who forgot to show up this morning and were told to try to get their act together and get here this afternoon. You can come back this afternoon, you can come back in a day or two. I think we have made some good progress, and I know that you're coming from further away than usual, so I'd like to make the most use of your time.

What's your pleasure? You want to come back at 3:30 in the afternoon and use the time from now to then? You can use the jury room.

MR. ANDERS: Maybe, your Honor. The only reason why I say that is, tomorrow I am leaving the country for a week for a family vacation, so I'm out of pocket for a week; I'll have some email but not a lot. So, again, I don't want to impose on everybody else, but that's my scheduling issue, so I'm not sure how much we'll get done within the next week.

THE COURT: That's why I'm suggesting you maximize -- I don't know what time your flight home is -- well, you're in Morristown.

MR. ANDERS: Today's fine for me, your Honor.

THE COURT: You're fine for today. If everybody wants to stay -- you just spent an hour talking about custodians and made some progress -- there's a certain benefit, I think, in keeping you hostage because it avoids the delay between phone calls, et cetera, et cetera. So if you want to take an hour for lunch, be all back at 2:00 o'clock, you can use the jury room.

MR. ANDERS: That's perfect.

THE COURT: And as soon as whatever is going on with my afternoon conferences gives me time to see you, we'll deal with you, but you're not leaving until you've checked out with me.

MR. ANDERS: Thank you, your Honor.

THE COURT: OK. Enjoy lunch, but get back, use the cafeteria on the eighth floor or whatever else, but don't waste half the afternoon by having a nice lunch.

MR. ANDERS: Understood.

(Recess)

THE COURT: We are back on the record for part two of Da Silva Moore et al. against Publicis.

What progress have you been able to make on the ESI protocols or, more importantly, which of the issues you've talked about would you like a court ruling or guidance on? Whatever you have agreed upon we will memorialize in some other

way.

MR. ANDERS: I think we made a lot of progress, your Honor. It may be easier just to say where we are.

On the list of custodians, we have identified eight custodians that the plaintiff would like us to add, five where they would be willing to first apply some level of filtering to their results, and then we would either manually review or possibly add those results into the database. We're going to go back and just confer with our clients and those individuals; there may be certain sensitivities about the particular people but we at least have been able to further narrow the custodians on the overall concept of predictive coding. We had a lot of conversation and discussion about that; I think we're in agreement on the process.

The process is going to be generally as we discussed it before, but what we're going to do is, I think, have more of the iterative reviews, and what we're going to try to do is hopefully be able to do those iterative reviews until we find the cliff that your Honor was referring to.

My only concern, and what I want to work into the agreement, is if these iterative reviews are taking longer than anticipated and the costs are mounting, having some mechanism in the agreement where there can be a point where we either discuss it or raise it with your Honor, that, look, we have reviewed 60,000 so far, this is what's coming back, the end

doesn't seem to be in sight and we've spent X amount, just having something in the agreement to address that possibility.

THE COURT: I have no problem with you all putting in the agreement that you're going to cooperate and work in good faith. But if things aren't working out because of expense or results not being what either of you hoped for or whatever, that it can be revisited with the Court, the caveat to that is obviously once you go down a certain route, it's going to be very expensive to completely abandon that and say we're now going to do something completely different, so that's probably not something you'll be able to do.

Tweaking it, in terms of adding another custodian late or doing a further iteration where you change a search term or better train the computer with some more documents, I don't have a problem with that occurring or the converse of that, with the defendant coming in and saying, you know, we've already spent twice what we thought we were going to spend, we've made enough progress that the next X percent search that that the plaintiff wants us to do is not worth the candle. That's what I said this morning as well.

All right, what else?

MS. WIPPER: We would add to that, plaintiffs would propose if we get to that point, that defendants don't do a manual review and just turn over the documents.

THE COURT: All right, that's an argument you can make

later on, that, OK, this system kicked out all of this. But usually the sampling is in lieu of that, which is to say that if you get to a certain cliff and you have reviewed -- I'll use defendants' number from before -- 40,000 and the next 50,000 are considered not likely to be relevant and you run a sample, statistical or random or whatever, of that balance, you say, OK, we looked at another thousand documents and found one that really was relevant, that's probably the end of the ballgame.

On the other hand, if you run a thousand and you find a hundred that are relevant, that may mean that more work has to be done in one way or another. And I'm not meaning to fully prescribe any, which your experts sitting behind you can probably do better, on what is your 95 percent confidence level or any of that stuff, but at some point it doesn't mean that because predictive coding spits it out as having a 1 percent chance of relevance, that I'm going to say, OK, the defendant has to forego manual review but produce all of it, as opposed to, you'll do a sampling and see if it really is mostly junk.

Understood?

MR. ANDERS: Understood.

THE COURT: On both sides?

MR. ANDERS: It makes sense, your Honor. I guess the way we had initially tried to craft the proposal was by putting up front the dollar figure that we thought was appropriate.

THE COURT: That's somewhat meaningless. And,

frankly, it then gets into fights about "if you didn't get to Recommind and you went to XYZ company, that piece of it would be 25 percent cheaper and that shouldn't be attributable to us and your associates at Jackson Lewis are paid too much per hour, that shouldn't be attributable to us." I will look at proportionality, but I'm not telling you that there is a particular number that's better than another on how much work you've got to do.

MR. ANDERS: I understand. That came across clear.

I just want to make sure that I understand what you're saying, is if, as we're going through this iterative review, we reach a point -- and I don't know what point is -- in terms of cost, where even if the computer is saying there is X percent relevance still out there, that we're not foreclosed from making the proportionality argument at that point.

THE COURT: That is correct.

MR. ANDERS: OK.

The other thing we had discussed, your Honor, were those sources that would not be reviewed through predictive coding. For those sources, we have agreed to do targeted searches of some of them; for others, we need to find more information about what information is actually housed there, but I think we were able to work through some of these other sources, shared drives --

THE COURT: This is the material that's on page 2 and

3 of plaintiffs' proposal, I assume?

MR. ANDERS: Yes, your Honor.

THE COURT: I'm not asking you to give me much more detail on that as long as there is agreement so that you're moving forward without the need of further court help on it.

MR. ANDERS: There is, your Honor. We're moving forward on that.

MS. WIPPER: There are two points that we wanted to raise. The first one was concerning the time period for the emails.

Earlier today defense counsel said that their email archive went back to 2008. There is also a separate email that's available from a legacy system that's stored in home directories or shared folders. So we would propose that for pay discrimination issues, that we would apply the longer period to 2 --

THE COURT: For pay discrimination, we're not doing an electronic search. You're getting that from the personnel material and the material you got on payroll. It's unlikely that email is going to find anything, and if it is, frankly, it's going to find it in the post-2008 period that's in the -- I'll call it the master database, the archive system, that they have established. So I don't see that as being necessary, certainly not in any immediate wave.

On all of this, I'm not foreclosing you, as you

develop information from the documents produced or from depositions, from saying that you have learned something new, but if there is a smoking gun email that says, you know, I'm the president of the company and it is our policy to pay women less than men, I guarantee you that will get repeated in the newer system. And for that needle in a haystack, I'm not going to have them bring up an additional search.

What else?

MS. WIPPER: I would just add to that much. They haven't produced the payroll data yet.

THE COURT: We talked about all of that this morning. I'm not revisiting things. It's been a long enough day.

MS. WIPPER: I just wanted, before we move from predictive coding, I also want to address the issue codes, what we agreed to do, because there's a dispute about the definitions that plaintiffs proposed. We're going to try to deal with that in the coding process; and it's possible, if we can't agree, that we would need the Court's assistance.

THE COURT: I'm sure I'll be seeing you again soon.

MS. WIPPER: OK.

MR. ANDERS: I believe that was it, your Honor. I think we were going to talk about some time frames. I think at least with the ESI protocol, my plan is probably the night before I leave to at least get emails out on questions about parts of the systems and then as soon as I return, if not while

I'm away a little bit, try to redraft the protocol to address what we discussed today.

THE COURT: I know every lawyer thinks they're indispensable and I'm not pulling the "Jackson Lewis is a big firm and you're all fungible," but is there not another person who may be less email savvy or computer savvy than you, such as Ms. Chavey, for example, who can follow up, along with the folks from Recommind and plaintiffs' counsel, and not lose an entire week because you're on vacation?

MS. CHAVEY: Of course, your Honor.

THE COURT: And I happen to know, it may not be on this case, if it's a true e-discovery dispute, I happen to know your Florida e-discovery counsel very well --

MR. ANDERS: He knows a little bit.

THE COURT: You can bring Mr. Losey into the mix if need be.

MR. ANDERS: OK, understood.

THE COURT: What else?

MS. CHAVEY: Your Honor, I know your Honor said you weren't going to reconsider what was addressed this morning, but I did look, during the break, about the issue about Mr. Tsokanos in complaints that had been made against him. I think on plaintiffs' counsel's representation that their understanding was there had been a complaint in 2005, you ordered us to provide that. There was not a complaint in 2005.

There was something earlier than that. And I just wanted to --

THE COURT: How early?

MS. CHAVEY: 2003.

THE COURT: But that was the Atlanta --

MS. CHAVEY: It was in Atlanta.

THE COURT: Produce it. Obviously it's discrete and can be found.

Before I lose track, for the paper discovery we talked about this morning, how soon can you complete that? One week, two weeks, six years? Come on.

MS. CHAVEY: Your Honor, we would need at least 30 days.

THE COURT: I don't know how you're going to do that in 30 days, finishing e-discovery protocol that's not going to be finalized for more than a week despite me getting other people involved while Mr. Anders is away, run the ESI, go through iterations and meet a June 30 discovery deadline with depositions and everything else. I think you're being a little generous there. So one more chance. Working harder, faster, et cetera, how soon can you do it?

MS. CHAVEY: Well, one issue, your Honor, for example, is with the personnel action notices. We understand the order to require us to work with the plaintiffs to come up with a statistically significant sample. That in and of itself is going to take a while and then there's going to be the

searching for the notices, so there is time that needs to be built in in order for that to occur.

THE COURT: Can you live with 30 days, Ms. Wipper? If not, tell me what you can live with.

MS. WIPPER: We have a deposition scheduled with defense witnesses starting the end of this month.

THE COURT: With all due respect, if you want to keep to that schedule, you're going to be deposing them without documents.

MS. WIPPER: Correct.

THE COURT: And let's all be clear on the way I run this, which is, if you want to take early depositions to learn things, that's fine; you don't get to redepose somebody whose deposition was finished because you get documents later that you knew you didn't have, as opposed to when they say, OK, we've completed our document ESI production and you take a deposition and then a week after the deposition they say look what we found in the warehouse somewhere; then you may get another deposition. So if you want to take a deposition at the end of the month, that's fine, but let's say I push them to get you something in two weeks, which means you both have to be very fast on how you're running the statistical significant determination, you're going to have to review it before the deposition, it's not likely to happen.

MS. WIPPER: I would propose three weeks. We work

with statisticians regularly so we can have the sample done or our proposed --

THE COURT: That sounds like a viable compromise.

So that is three weeks from today, which is January 25th, subject to somebody, by written agreement or by applying to the Court for more time, we'll go from there.

OK, other than a date for you all to come back and probably a date for you to complete the ESI protocol to ensure that your feet are held to the fire, is there anything else we need to do on discovery today?

MS. WIPPER: I just wanted to address one point from earlier today and just get clarification from the Court. On the cutoff date for the production, you said February 2011 for the HR complaints. I'm wondering if that's a global cutoff date. We have a plaintiff that left the company after that date, Carol Pearlman --

THE COURT: Is she in the original complaint or the amended complaint?

MS. WIPPER: She's an opt-in plaintiff.

THE COURT: When did she opt in?

MS. WIPPER: I don't know off the top of my head. Probably months ago.

THE COURT: The amended complaint is dated April 14th. Was it before or after?

MS. WIPPER: No, it was after that.

THE COURT: You've got to have some way of dealing with this. So I'm inclined to either leave it at the February date or maybe to push it to April 14th of 2011, other than when we get to privilege issues, I'm not going to require them to log almost anything post initial complaint.

MS. WIPPER: We would propose the amended complaint date as the cutoff.

THE COURT: So we're adding a month and a half or something. Problem, agreement?

MS. CHAVEY: Well, it seems appropriate to limit it to and cut it off at the date of the initial complaint. The fact that Carol Pearlman opted into the April Pay Act claim later doesn't seem to affect the Court's ruling that the date would be February.

THE COURT: All right, let's leave it where it was originally.

What else?

MR. ANDERS: Your Honor, I just want to make sure I heard correctly: Did you give a definite date for when the ESI protocol must be completed?

THE COURT: No. Give me a proposal. A week after you come back or a/k/a two weeks from today?

MR. ANDERS: That would be perfect.

THE COURT: Agreeable?

MS. WIPPER: Sure. And you want a joint proposal,

your Honor?

THE COURT: Yes. And if you can't agree, I want it as a single document with paragraph 3, whatever paragraph 3 is about, 3(a) plaintiffs' proposal, 3(b) defendants' proposal, and then a cover letter from each of you explaining, to the extent it's not immediately obvious, what it is you're disagreeing on. So that's January 18th.

OK, next, date for our next court conference, what's your pleasure?

MS. WIPPER: How about a week after the ESI protocol?

THE COURT: Well, I think that's probably going to be early unless you think there are ESI protocol problems, only in the sense that the document production out of what I'll call this morning's production is due the 25th. On the other hand --

MS. CHAVEY: Your Honor, what about February 2nd?

THE COURT: That's LegalTech week. Yes, by Thursday that's OK. February 2nd at 9:30.

Now, the other thing: When is it you plan to move for class certification?

MS. WIPPER: I believe it's in the schedule, your Honor.

THE COURT: I don't think it is but I'm willing to be educated.

MS. CHAVEY: Your Honor, it is in the scheduling order

but it is due on or before April 1st of 2013.

THE COURT: Frankly, that makes no sense to me. I know you convinced Judge Sullivan to do that. It won't be the first time I've overruled the district judge; it's a strange world that we live in.

Yeah, I understand the purpose of getting past the expert period, but if you make the motion on April 1, it won't be fully briefed until the summer of 2013, it won't be decided until the fall of 2013 or January 2014. You can't really do summary judgment or anything substantive until the class either has or hasn't been certified. And then if either a class or an FLSA collective action is certified or the appropriate other term for a collective action is approved, you've got to go through 30 days to draft the notice, 60 days or 90 days for people to opt in, you are assuring -- and this is something plaintiffs should be thinking about even more than the defendants -- you're assuring no merits resolution of this, assuming a class of any sort, class or collective is approved, until 2014 or '15. That hardly seems to be in plaintiffs' interests. And I'm not sure that on the FLSA collective action -- you've got discrimination claims -- that's one type of motion -- and to the extent you've got FLSA and New York Labor Law claims, that's a much more discrete area, it seems to me. And leaving all of that until the very end, particularly since FLSA requires opt-in plaintiffs, and my recollection but

you all tell me if I'm wrong, is that there is no stopping of the statute of limitations until they opt in?

MS. WIPPER: Correct.

THE COURT: So if this case, which began in early 2011, if it's not certified until 2014 or '15 for collective action issues, the whole period between now and then, when you will assume that if there was anything bad going on at the defendants, they will have cleaned up their act during the course of this lawsuit -- and I'm not saying I know there was anything bad or good going on -- you're assuring that the FLSA in particular, even with a six-year statute of limitations on the state claims, is going to be almost a nullity or it's going to be a totally different lawsuit, that most of the period within the statute of limitations is going to be a period on which there has been no discovery.

Does it make sense -- not that I want more work for Judge Sullivan or myself -- to do something differently for the FLSA New York Labor Law than the Title 7 and related discrimination claims?

MS. WIPPER: Well, your Honor, I think it depends on the discovery because we have the burden and we have been spending an enormous amount of time trying to get discovery in this case for many, many months. So, today, as I stand here today, I can't say for sure we will be prepared to file something until we have the discovery.

THE COURT: On the FLSA and New York Labor Law?

MS. WIPPER: We need the payroll data.

THE COURT: Well, you basically have that, I thought, subject to the cleanup -- and I'm not revisiting what I ordered this morning. So that you're going to have by the end of this month. Whatever work your experts need to do, I don't see waiting until April 1st of 2013, and, frankly -- and I'm not trying to help the defendants -- if I were them, I'd oppose certification at that point if for no other reason than that most of the period within the statute of limitations will be a period where there hasn't been discovery. And if we stick to the schedule, because you got Judge Sullivan to approve it and I decide not to stick my neck out and overrule him, so to speak, I'm not reopening discovery. You can bet on that. Once discovery closes, it is done, because nobody wanted bifurcation the second time today because 99 percent of it was held to be relevant either way. Think about it and maybe in February, too, we can revisit that issue.

MS. WIPPER: OK.

THE COURT: I guess the last issue, although I suspect -- I don't know what I suspect. I generally at first or early conferences raise the 636(c) issue. I don't remember raising it at our prior conference because they were on a sort of emergency basis, et cetera. But I remind both sides that pursuant to 28, U.S. Code, Section 636(c), if all parties

consent, then the case can be in front of me for all purposes, including the jury trial you've asked for here and any appeals to the Second Circuit, they're the same from a magistrate judge, consented trial or motion decision, as it would be in front of a district judge, and it's up to all of you and our missing friends from Publicis.

So by the February 2 conference, obviously a decision to keep thinking about it keeps your options open, but it also keeps one side or the other -- whoever is in favor of it now and the other one is not so sure, by two months later, that position may reverse. So the sooner you all decide, you decide, I'll ask you to tell me where you are at the February 2 conference and we'll go from there.

And finally -- perhaps my second "finally" but finally, the jurisdictional discovery and all that against Publicis, is anything happening in that area? I don't want them to prejudice them from not being here but I don't know that the quietness with respect to that, as opposed to everything going on here, is the result of nothing going on or is the result of there not being the same problems.

MS. WIPPER: Well, we served discovery on October 19th on Publicis Groupe according to the schedule, and on MSL. They asked for a month extension to respond. We gave that to them and they produced documents, some documents, Publicis Groupe, and responded with objections on the 21st. We're probably

going to have to have a meet-and-confer with them concerning some of their objections and their responses, but right now we don't foresee any disputes at this time.

THE COURT: Well, you've got a March 12th cutoff. The earliest I'm likely to want to deal with that, since it seems like you all are going slowly, is at the February 2 conference. That's going to leave you very little time if there are problems, to get them resolved and get whatever depositions or whatever are going to occur post the paper/ESI side of discovery. So don't lose sight of it. Let's have Publicis here at the next conference, even if there is complete agreement that everything they have been doing is fine.

The other thing is, you all can figure out how to do this when we're going to have megaconferences like this. I certainly prefer everyone to be present in person. If it gets to the point where you know in advance there's one minor issue and one of the local counsel, more local, will be here and the other is from San Francisco, for example, while the airlines need all the help they can get, it's not my job to feather their covers, so if you want to show up telephonically, ask for permission to do that, which, as I say, will be granted if you really think the conference is going to be the typical half hour discovery conference and not the 500 pages of letters, et cetera, et cetera, like we had today. You do not need to ask permission for your e-discovery consultants to attend. If

there are any ESI issues, and assuming you're willing to pay the freight for them, I am not only delighted to see them but they're usually a valuable addition.

I think that covers everything. I guess I'll just say, my rules provide that if things start going much more smoothly and two business days before the next conference we decide you really are getting along swimmingly and you worked things out and things should just be put off a few weeks, you can make that application, either by a joint phone call to my secretary or by a fax, requesting that, and nine times out of ten those requests are granted. They're not granted when they come in at 5:00 o'clock the night before and the Court suspects that somebody's already on an airplane. And they're not granted unless they're on consent, meaning if one side says I don't need the conference but the other side is frothing at the mouth because they're being frustrated, we're obviously going to have a conference.

Any questions?

MS. CHAVEY: No, your Honor.

THE COURT: All right, the transcript, as usual, constitutes the Court's order. And I think I may have said this once before -- and somebody certainly took up the process and therefore knows the process -- but I'll say it this last time, I may not say it again in the future: Pursuant to 28, U.S. Code, Section 636 and Federal Rules of Civil Procedure 6

and 72, any party aggrieved by a ruling at one of these discovery conferences has 14 calendar days to bring their objections to Judge Sullivan. The 14 days starts running immediately when you attend any in-person or telephonic conference and hear my ruling accordingly, regardless of how long it takes me to obtain the transcript from the reporter. And failure to file objections within that 14-day period constitutes a waiver for all further purposes in the case, including any appellate purposes.

With that, I'll require both sides to purchase the transcript from the reporter and with that, we are adjourned. Have a good flight back, or drive back, to everyone going in different places. Have a good vacation --

MR. ANDERS: Thank you, your Honor.

THE COURT: -- and happy new year. See you all in a month.

MS. CHAVEY: Thank you, your Honor.

MS. WIPPER: Thank you, your Honor.

MR. ANDERS: Thank you.

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